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Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1969

WILLIE ELLIS LANIER,

Petitioner,

versus

1551

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TONEY AND GUARISCO
200 East College Avenue
Tallahassee, Florida

Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1969

No.

WILLIE ELLIS LANIER,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent..

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Justices of the Supreme Court of the United States of America:

Petitioner, Willie Ellis Lanier, by his attorney, S. Gunter Toney, presents this his Petition for Writ of Certiorari:

REPORT OF OPINIONS BELOW

The District Court entered judgment and imposed sentence but did not hand down an opinion.

The opinion of the United States Court of Appeals for the Fifth Circuit has not yet been published in any official or unofficial report. That opinion is attached hereto.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Petitioner seeks to have reviewed a judgment of the United States Court of Appeals, Fourth Circuit, dated the 4th. day of March, 1970, affirming the judgment and sentence of the United States District Court for the Eastern District of North Carolina, Raleigh Division, on appeal; the Petition for Rehearing was denied on the 30th. day of March, 1970, and is included in the certified transcript of the record filed herewith.

The statutory provision conferring on this Honorable Court jurisdiction to review the judgment of the United States Court of Appeals,Fourth Circuit, is 62 Statutes 928 (June 25, 1948, Chapter 646).

QUESTIONS PRESENTED FOR REVIEW

The points relied on by the Petitioner for granting of the Writ of Certiorari, is as follows:

DID THE DISTRICT COURT ERR IN FINDING THAT THE EVIDENCE ESTABLISHED BEYOND A REASONABLE DOUBT THAT PETITIONER'S CONFESSION WAS VOLUNTARILY GIVEN WHERE EVIDENCE WAS IN SHARP CONFLICT BETWEEN PETITIONER AND GOVERNMENT AGENT AS TO THE PETITIONER'S DEMAND FOR COUNSEL AND WHERE THE PETITIONER'S VERSION IS CORROBORATED BY SUCH AGENT ADMITTING:
(1) THAT PETITIONER REFUSED TO SIGN WRITTEN WAIVER OF COUNSEL,
(2) REQUESTED TO CONTACT HIS WIFE TO SECURE COUNSEL, AND,
(3) HE (AGENT) CONTACTED PETITIONER'S WIFE AND LEARNED OF HER INABILITY TO OBTAIN COUNSEL?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES AND RULES INVOLVED

Title 18 U.S.C., Sec. 2312 provides:

"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 806."

STATEMENT OF THE CASE

The Petitioner was indicted by the Grand Jury of the United States District Court for the Eastern District of North Carolina, Raleigh Division.

Count One of the Indictment charged Petitioner with violation of 18 U.S.C. 2312 (interstate transportation of a stolen motor vehicle).

Out of the presence of the jury the District Court took testimony as to the admissibility of the admissions and confession of Petitioner (TR. 56-62). The District Court made a finding that the evidence established beyond a reasonable doubt that such admissions or confession was voluntarily given (TR. 62-63).

Petitioner was tried by jury and found guilty (TR. 165) and sentenced for a period of five (5) years (R. 10).

ARGUMENT

DID THE DISTRICT COURT ERR IN FINDING THAT THE EVIDENCE ESTABLISHED BEYOND A REASONABLE DOUBT THAT PETITIONER'S CONFESSION WAS VOLUNTARILY GIVEN WHERE EVIDENCE WAS IN SHARP CONFLICT BETWEEN PETITIONER AND GOVERNMENT AGENT AS TO THE PETITIONER'S DEMAND FOR COUNSEL AND WHERE THE PETITIONER'S VERSION IS CORROBORATED BY SUCH AGENT ADMITTING:
(1) THAT PETITIONER REFUSED TO SIGN WRITTEN WAIVER OF COUNSEL,
(2) REQUESTED TO CONTACT HIS WIFE TO SECURE COUNSEL, AND,
(3) HE (AGENT) CONTACTED PETITIONER'S WIFE AND LEARNED OF HER INABILITY TO OBTAIN COUNSEL?

This Court in Miranda v. State of Arizona, 384 U.S. 436, 444-445, 86 S. Ct. 1602, 1612 held:

> "The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." ...
>
> "An individual need not make a pre-interrogation request for a lawyer ... . No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings ... ." (384 U.S. at Page 370, 86 S. Ct. at Page 1626).
>
> " If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." (384 U.S. at Page 475, 86 S. Ct. at Page 1628).
>
> "Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights." (384 U.S. at Page 476, 86 S. Ct. at Page 1629).

Officer Donald M. Murray, Special Agent of the Federal Bureau of Investigation testified that on March 5, 1969, he conducted an in-custody interrogation of Appellant (Tr. 38, 45); and Appellant was advised of his constitutional rights:

> "... he did not have to discuss the matter with me, or even talk to me, and whatever he told me could be used against him in a court of law, that he was entitled to an attorney and if he could not have an attorney or afford an attorney one would be appointed for him, at any time he desired to stop discussing it if he so chose to discuss, he could stop, he had the right to remain silent.
>
> Q: Did he desire to make any statement after being advised?
>
> A: Yes, sir, he did. I asked him if he would sign a waiver, and he said he did not want to sign the waiver and he said he did not want to sign the waiver because he was willing to orally waive these rights and discuss the matter with me." (Tr. 45-46).

Agent Murray then, out of the presence of the jury stated that Appellant answered the questions up to a point where he indicated a desire to contact counsel "...concerning an anticipated hearing ... ."; that at this point the interview was concluded (Tr. 49).

Out of the presence of the jury the Appellant testified that he refused to sign a waiver presented to him by Agent Murray (Tr. 57); that he was advised of his right to remain silent and to consult with an attorney; that he (Appellant) specifically requested the opportunity to consult with an attorney; that the Agent persisted in questioning him (TR. 58); that he (Appellant)

sought permission to talk with his wife for the purpose of obtaining an attorney (Tr. 60); that he finally gave his consent for the search of his vehicle (Tr. 62).

The District Court ruled that the evidence established beyond a reasonable doubt that the Appellant's admissions were voluntarily given (Tr. 62-63).

In the presence of the jury, Agent Murray repeated his testimony as to warnings given the Appellant, and the incriminating statements of Appellant (Tr. 63-74).

On cross-examination, Agent Murray admitted that Appellant expressed a desire to see his wife for the purpose of securing an attorney; that he (Agent Murray) searched the streets for the Appellant's wife and learned that she had been unsuccessful in locating an attorney (Tr. 79).

It is submitted that the Government failed to demonstrate that the Appellant waived his right to counsel and to remain silent prior to his incriminating statements. The evidence that Appellant refused to sign a waiver of his rights, sought opportunity to contact his wife for the purpose of consulting counsel is not in conflict. The record only shows the bare uncorroborated conclusion on the part of Agent Murray that Appellant orally waived his rights to remain silent and to counsel.

This Court in Frazier v. Cupp, 394 U.S. 731, 737, 89 S. Ct. 1420, 1424 in a past Escobedo and pre Miranda case, in response to

Petitioner's argument, that his statement about getting a lawyer was sufficient to bring Escobedo into play and that the police should immediately have stopped the questioning and obtain counsel, stated that it might agree were Miranda applicable to the case, quoting the officers' duty to cease questioning when a suspect indicated in any manner that he wished to consult an attorney before speaking.

The United States Court of Appeals for the Fourth Circuit in the case of United States v. Thompson, 4 Cir., 417 F. 2d 196, 197, where the defendant refused to sign a waiver, stated he understood his rights and answered the officers' questions, held the confession admissible inasmuch as there was no evidence of prolonged interrogation and coercion. The opinion does not reveal an oral waiver of rights.

See United States v. Hayes, 4 Cir., 385 F. 2d. 375, 377-378, where the Fourth Circuit Court of Appeals found "other fully effective equivalent waiver" in the absence of a written or oral waiver.

It is submitted that as the initial impact of Miranda recedes into history, there is grave danger that trial courts may in a perfunctory manner grudgingly apply the Miranda principles, strain to find implied waiver of constitutional rights and in reality shift the burden of proof from the Government to the suspect.

PRAYER

WHEREFORE, the Petitioner prays that he may be granted a Writ of Certiorari and that this Honorable Court on hearing quash the Judgment of the United States Court of Appeals, Fourth Circuit, affirming the Judgment and Sentence of the District Court and Petitioner further prays for such other further general relief as may be meet and proper.

Respectfully submitted,

TONEY AND GUARISCO
200 East College Avenue
Tallahassee, Florida

Attorneys for Petitioner.

S. GUNTER TONEY

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Petition for Writ of Certiorari, by air-mail, to the Honorable Warren H. Coolidge, United States Attorney, P. O. Box 2597, Raleigh, North Carolina, and a copy to Solicitor General, Department of Justice, Washington 25, D. C., on this 7th. day of May, 1970.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,447.

Willie Ellis Lanier,

Appellant,

VERSUS

United States of America,

Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina.

ORDER

Upon consideration of the record and the briefs the court is of the opinion that oral argument will not be necessary and that there is no merit to the appeal. The judgment of the District Court is hereby affirmed.

s/ Simon E. Sobeloff
United States Circuit Judge

s/ J. Braxton Craven, Jr.
United States Circuit Judge

/S/ [illegible]
United States Circuit Judge

FILED

SAMUEL W PHILLIPS
CLERK

A True Copy. Test:
Samuel W.
By Beverly M. Spruill
Deputy

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1551

WILLIE ELLIS LANIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On August 27, 1969, petitioner was convicted by a jury in the United States District Court for the Eastern District of North Carolina for transporting a stolen vehicle in interstate commerce in violation of 18 U.S.C. 2312. He was sentenced to five years' imprisonment, and made eligible for parole at such time as the board of parole might determine, pursu-

ant to 18 U.S.C. 4208(a)(2) (Tr. 174). In an order dated March 4, 1970, the court of appeals affirmed *per curiam* (Pet. App.). A petition for rehearing was denied on March 30, 1970. On April 30, 1970, petitioner applied for an extension of time in which to file a petition for a writ of certiorari. Chief Justice Burger extended the time to and including May 9, 1970, with the proviso that the granting of the extension of time was "without prejudice to the Court's consideration of whether this application has been filed in time." The petition for a writ of certiorari was filed on May 11, 1970, beyond the extended time.

The only issue raised is the admissibility of petitioner's statements to an F.B.I. agent made after petitioner had been arrested while driving a stolen vehicle in North Carolina in March, 1969.[1] At a hearing outside the presence of the jury, the F.B.I. agent testified that he had told petitioner of his rights and that petitioner indicated he wanted to make a statement. The agent then asked petitioner to sign a waiver, but petitioner declined, saying that he was willing to waive his rights orally and to discuss the matter. No promises were made nor was there any attempt to coerce or threaten petitioner. (Tr. 46). Petitioner said that when he and his wife were driving from New York to visit her grandmother in

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[1] Petitioner, using the name Johnnie Langhorn, had sold the car for $2900 to a dealer in North Carolina subject to verification of title but had driven off in the car after the owner left the lot (Tr. 13-20).

Georgia, he met four individuals who said they were going to a used car dealer in Kenly where they could get a good price. Petitioner decided to accompany them. He said that he had bought the Buick in Brooklyn, New York, for $1000, and that, while he realized the price was low, he did not regard it as unusual. Petitioner denies knowing that the vehicle had been stolen. When asked about the check made out to "Johnnie Langhorn" (see fn. 1), petitioner acknowledged receiving it (Tr. 46-48). At this point, he said that he did not wish to discuss the matter further until he had an opportunity to talk with an attorney, but that he would be willing to continue once he had contacted an attorney. The interview was then concluded (Tr. 49).

Petitioner testified that the agent first approached him with some papers to sign, but that he did not do so because he did not know what was in them. The agent advised petitioner that he did not have to answer any questions and that he had a right to an attorney (Tr. 58), and then told petitioner that he wanted to interview him. According to petitioner, he asked for a lawyer at the beginning of the interview and was given no opportunity to obtain one. He nonetheless agreed to answer questions concerning the car (Tr. 58-59). Petitioner admitted that he had not been promised anything and that he had not been injured or coerced (Tr. 60-61).

Upon this evidence, the court determined beyond a reasonable doubt that the statements were made voluntarily, and without threat, duress, or coercion (Tr. 63). This ruling, which the court of appeals

approved, is supported by the record. Both petitioner and the interrogating agent agreed that petitioner had received the warnings dictated by *Miranda* v. *Arizona*, 384 U.S. 436, and that he had not been promised anything nor coerced, threatened or injured in any way. Petitioner's claim that he asked for but was refused an opportunity to consult with counsel was contradicted by the F.B.I. agent whom the judge (and jury) had the right to credit. The fact that petitioner declined to sign the waiver form does not mean that petitioner was unaware of his rights. The agent testified that petitioner agreed orally to waive his rights, even though he would not sign a waiver form. Petitioner then began to answer questions. Given these circumstances, the trial court could properly find an effective waiver. *United States* v. *Thompson*, 417 F.2d 196 (C.A. 4), certiorari denied, 396 U.S. 1047; *United States* v. *Hayes*, 385 F.2d 375 (C.A. 4), certiorari denied, 390 U.S. 1006.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1970.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 387376 772

Continuation of Appendix to petition for writ of certiorari, BANKERS MORTGAGE COMPANY v. UNITED STATES, No. 1552 in the Supreme Court of the United States, October Term, 1969.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BANKERS MORTGAGE COMPANY v. UNITED STATES OF AMERICA	}	CIVIL ACTION No. 67-H-977

MEMORANDUM AND ORDER

On June 9, 1937, plaintiff (Bankers Mortgage Company) executed two notes payable to Humble Oil & Refining Company, one for $100,000.00 and one for $200,000.00, both at 4% interest per year and due on or before June 9, 1967. Interest on the first note was payable monthly and interest on the second payable in a lump sum at maturity. To secure the two notes, plaintiff executed a deed of trust or mortgage and also entered into a contract with Humble further describing the rights of the parties. Both the deed of trust and the contract concerned a 299.5 acre tract in Fort Bend County, Texas. The tract was subject to an oil and gas lease from Bankers Mortgage to Humble, and Humble also was the lessee of surrounding tracts from their respective owners. Plaintiff owned a 2/3rds mineral interest and was receiving from Humble 1/180th of all the oil and gas produced and also 2-2/9¢ per long ton of sulphur recovered by Humble from the 299.5 acre tract under the provisions of the lease from plaintiff to Humble.

Under the contract executed between plaintiff and Humble incident to the deed of trust, royalties which became

due under the provisions of the agreement would be retained by Humble and used to liquidate the amount due on the notes. Various options were given both to plaintiff and Humble. If Humble did not exercise a right given in the instrument to purchase the property, and if plaintiff did not exercise its option to require Humble to purchase the property, plaintiff could pay the remaining balance due under the notes and secure a release of the lien.

The Commissioner of Internal Revenue assessed a deficiency against plaintiff in connection with its 1937 income tax on the theory that the above transaction was a sale, not a loan. The Tax Court agreed with the Commissioner and characterized the transaction as " 'a technically elegant arrangement whereby an intricate outward appearance was given to the simple sale' from the taxpayer to the Oil Company." The Tax Court decision was affirmed by the United States Court of Appeals for the Fifth Circuit. *Bankers Mortgage Co.* v. *Commissioner*, 1 T.C. 698 (1943), *aff'd*, 141 F.2d 357, *aff'd on rehearing*, 142 F.2d 130 (5th Cir.), *cert. denied*, 323 U.S. 727 (1944). Plaintiff was therefore required to pay a capital gains tax on the $300,000.00 received as proceeds of the two "loans."

After the adverse court decisions, plaintiff treated the nature of the transaction in the manner found by the Court, based upon the facts that existed in 1937. However, Humble did not exercise its option to purchase the property, nor did plaintiff exercise its option to require Humble to purchase the property, but rather, in April, 1962, plaintiff paid the $200,000.00 note, including interest in the amount of $137,389.29, and obtained a release of the deed of trust lien.

In connection with the 1962 transaction, plaintiff filed its income tax return and claimed a deduction for the interest

paid to Humble in that year. The Internal Revenue Service disallowed the deduction and assessed a deficiency against plaintiff, taking the position that the interest payment was a payment to repurchase the mineral interest which was "sold" in 1937.

Plaintiff brings this action to recover income taxes alleged to have been erroneously, illegally, and improperly assessed and collected. Plaintiff alleges that it has overpaid its United States Corporation Income Tax for the year 1937 in the amount of $126,010.71 and has overpaid interest in the amount of $39,063.39, and that for the year 1962 the tax was overpaid in the amount of $71,442.43 and the interest was overpaid in the amount of $11,145.02. Thus, plaintiff is once again contending that the $300,000.00 received from Humble in 1937 represented the proceeds of a loan, and is further contending that the $137,389.29 paid to Humble in 1962 was a payment of interest on the "loan."

This cause is now before the Court on the government's motion for judgment on the pleadings.[1] The government contends that both the statute of limitations and the doctrine of res judicata preclude plaintiff's recovery for the year 1937. The government further contends that plaintiff is collaterally estopped by the decisions of the Tax Court and the Fifth Circuit from denying that the 1937 transaction was a sale and therefore is precluded from contending that the payment made in 1962 was in repayment of a "loan."

---

[1] Under a motion for judgment on the pleadings, "all well-pleaded allegations of the opposing party's pleadings are to be taken as true, and . . . all allegations of the moving party which are denied are to be taken as false." *Edmonds* v. *United States*, 148 F.Supp. 185, 186 (E.D. Wisc. 1957). *See National Metropolitan Bank* v. *United States*, 323 U.S. 454 (1945); *Brown* v. *Bullock*, 194 F. Supp. 207 (S.D.N.Y.) *aff'd*, 294 F.2d 415 (2d Cir. 1961). For this reason, the Court's statement of the facts has been drawn from plaintiff's complaint and supporting brief.

Initially the government contends that plaintiff's claim for refund for the year 1937 was not filed within the time prescribed in section 6511 of the Internal Revenue Code of 1954. Plaintiff, on the other hand, contends that it falls within the provisions of sections 1311-1314 of the Internal Revenue Code of 1954. These sections obviate the application of the statute of limitations (§6511) in those cases where the Commissioner of Internal Revenue has maintained an inconsistent position with regard to the transaction at hand. Plaintiff's complaint alleges that the Commissioner has maintained such inconsistent positions. Although the complaint and supporting briefs are devoid of factual support for this contention, in a motion for judgment on the pleadings every doubt must be resolved against the movant. Therefore, the Court will assume that plaintiff's averment in the complaint is sufficient to invoke the provisions of sections 1311-1314.

The government's contention that the decisions of the Tax Court and the United States Court of Appeals for the Fifth Circuit are res judicata the 1937 transaction is well taken. There is no doubt that the matters raised by plaintiff's complaint with regard to the 1937 transaction have already been decided and affirmed by courts of competent jurisdiction. The cause of action is the same and the same parties are involved. Therefore, the doctrine of res judicata is applicable. See *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948); *Hyman* v. *Regenstein*, 258 F.2d 502 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959).

Plaintiff does not contest the application of the doctrine of res judicata to the case at hand, but rather invokes Rule 60(b) of the Federal Rules of Civil Procedure and the equitable powers of this Court to bring an independent cause of action seeking relief from the 1943 judgment. Rule 60(b) provides, in part, that:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the judgment . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding . . ."

Thus, plaintiff contends that it should be able to attack the 1943 judgment under Rule 60(b) due to the occurrence of subsequent events which have rendered that judgment unjust. The subsequent events of which the taxpayer speaks is the fact that in 1962, twenty-five years after the initial transaction, the taxpayer has treated the transaction as a loan.

Although Rule 60(b) does not specifically state that the occurrence of subsequent events rendering the judgment unjust is a basis for attacking a judgment, the rule does encompass any relief from a judgment that was obtainable with common-law writs. See *W. Barron & A. Holtzoff, Federal Practice & Procedure* §1331 (Wright ed. 1958). The writ of audita querela was a common-law writ used to correct a judgment which was rendered unjust by subsequent developments. See *In re Drainage Dist. No. 7*, 25 F.Supp. 372 (E.D. Ark. 1938).

Granting that the Court is empowered by Rule 60(b) to entertain an independent action on the above-stated grounds, the question remains as to whether the present case comes within those grounds. The only case cited by taxpayer in support of its Rule 60(b) contention is *In re Drainage Dist. No. 7, supra*, and that case is distinguishable from the case at hand. In *Drainage Dist.* the plaintiff had previously received a judgment against the District from the Arkansas Supreme Court in which that

court held that his lands were totally and permanently destroyed. The District was insolvent at the time of the judgment. Most of the District's creditors, not including plaintiff, agreed to a debt composition plan. Later, with the aid of the Reconstruction Finance Corporation, the District regained its solvency. Plaintiff then sought to enforce its judgment and to gain a preference over the other creditors. In the interim, plaintiff's land was restored to productivity. The case turned on the application of the Bankruptcy Act to plaintiff's judgment. But, as an aside, the Court stated:

> "Throughout our jurisprudence there has always been some method of correcting a judgment which has become unjust by subsequent developments. . . .
>
> "It would not be just to give . . . [plaintiff] preference based upon an announcement of the Supreme Court [of Arkansas] which is rendered baseless by subsequent facts." *Id.* at 383.

Thus, the Court bolstered its decision not to allow plaintiff a preference by pointing out that subsequent events had belied the judgment.

Even assuming that the Court's dictum was controlling in *Drainage District,* that case is readily distinguishable from the present case. In *Drainage District* the judgment had never been enforced and the subsequent events which called it into question were completely beyond the control of the party attacking the judgment. In the case before this Court, the judgment has been enforced for twenty-five years and the subsequent events in question are of plaintiff's own making.

Ultimately, the question of whether Rule 60(b) applies to this case resolves itself into a question of whether the continued enforcement of the prior judgment results in an

injustice to plaintiff. It does not. Plaintiff has always had the ability to "disprove" the decisions of the Tax Court and the Court of Appeals. Those courts were well aware that plaintiff could later treat the transaction as a loan. The very fact that so many options were left open to plaintiff is what persuaded the courts that, for tax purposes, the transaction between plaintiff and Humble must be considered a sale. The Court's equitable power to interfere with a prior judgment should be exercised only upon the most stringent grounds. See *Pickford* v. *Talbott*, 225 U.S. 651 (1912); *Caputo* v. *Globe Indemnity Co.*, 41 F.R.D. 436 (E.D. Pa. 1967). This case does not warrant such interference, especially when the situation complained of is one of plaintiff's own making. Accordingly, the government's motion for judgment on the pleadings is granted as to the 1937 transaction.

As to the 1962 transaction, the Court is not persuaded that the doctrine of collateral estoppel bars plaintiff's suit. Collateral estoppel applies to tax proceedings which involve the same legal points for different tax years. But it only applies when there has been no change in the controlling facts or applicable legal principles. It does not apply where there are new facts which did not exist at the time of the prior judgment. See *Commissioner* v. *Sunnen*, 333 U.S. 591 (1945); *Thomas* v. *Commissioner*, 324 F.2d 798 (5th Cir. 1963); *Johnson* v. *Fleming*, 264 F.2d 322 (10th Cir. 1959); *Flato* v. *Commissioner*, 245 F.2d 413 (5th Cir. 1957). Assuming for the purposes of this motion for judgment on the pleadings that plaintiff's 1962 transaction is explainable only as a repayment of a loan, this is a significant change of facts so as to preclude the application of collateral estoppel. This Court makes no decision as to the merits of plaintiff's contentions; it decides only that plaintiff should not automatically be precluded

from making his assertions as to the tax consequences of the 1962 transaction.

Therefore, for the above reasons, the government's motion for judgment on the pleadings is granted as to the 1937 transaction. In all other respects, the motion for judgment on the pleadings is denied.

The United States Attorney shall prepare and submit an appropriate order, after first allowing counsel for plaintiff an opportunity for inspection and approval as to form. Such an order shall be submitted to the Court for approval and entry on or before October 31, 1968.

The Clerk will send true copies of this Order to the United States Attorney and counsel for plaintiff.

DONE at Houston, Texas, this 18th day of October, 1968.

United States District Judge

/s/ JOHN V. SINGLETON, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BANKERS MORTGAGE COMPANY *Plaintiff.* v. UNITED STATES OF AMERICA *Defendant.*	CIVIL ACTION No. 67-H-977

ORDER

The defendant's motion for judgment on the pleadings with respect to the plaintiff's cause of action for its taxable years 1937 and 1962 having duly considered by this Court, and the Court being of the opinion that same should be granted as to the year 1937 and denied as to the year 1962, it is hereby

ORDERED, ADJUDGED AND DECREED that the plaintiff's complaint against the defendant, as respects the year 1937, be and is hereby dismissed with prejudice. It is hereby

FURTHER ORDERED, ADJUDGED AND DECREED that the defendant's motion for judgment on the pleadings, as respects the year 1962, be denied.

DONE this 1st day of November, 1968.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

APPROVED AS TO FORM:
/s/ WALTER P. ZIVLEY
Walter P. Zivley
Attorney for Plaintiff

/s/ ROBERT L. TRIMBLE
Robert L. Trimble
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BANKERS MORTGAGE COMPANY *Plaintiff.* v. UNITED STATES OF AMERICA *Defendant.*	CIVIL ACTION No. 67-H-977

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a civil action filed by the taxpayer, Bankers Mortgage Company, for the recovery of taxes and interest for its taxable years 1937 and 1967. Taxpayer's cause of action respecting its taxable year 1937 was dismissed by a previous order of this Court pursuant to the defendant's motion for judgment on the pleadings. The following findings of fact and conclusions of law relate only to the year 1962.

Findings of Fact

1. Prior to 1937, the taxpayer acquired certain mineral interests in a 299.5-acre tract of land in the Sugarland Oil Field in Fort Bend County, Texas. Also, prior to 1937, the taxpayer entered into an oil and gas lease with H. C. Cockburn under which the taxpayer reserved certain mineral royalties. Subsequently, Cockburn assigned his interest in the lease to Humble Oil & Refining Company (Humble). At all times here material, the leasehold estate was held and operated by Humble.

2. On June 9, 1937, the taxpayer received $300,000 from Humble and executed two notes payable to Humble, one for $100,000 (Note No. 1) with interest at 4% per annum,

and one for $200,000 (Note No. 2) with interest at 4% per annum, both of which were due on or before June 9, 1967. The interest on the $100,000 note was payable monthly as it accrued, and the interest on the $200,000 note was due in a lump sum at maturity. To secure a payment of the two notes, the taxpayer gave Humble a deed of trust covering its mineral interest in the above-mentioned tract, including the royalty reserved under the Cockburn lease.

3. The taxpayer entered into an additional agreement with Humble whereby the royalties otherwise payable to the taxpayer under the Cockburn lease would be applied by Humble to repay the notes, first to the accrued interest on the $100,000 note and then to the principal due on the $100,000 note until that note was fully liquidated, and finally to the principal of the $200,000 note. The options and other rights which were granted under the terms of the contract were:

(a) Humble was given the option to purchase the 2/3 mineral interest of Bankers Mortgage at or within 20 days after the liquidation of maturity of the indebtedness. If such option were exercised, the interest due on Note No. 2 would be cancelled, and Humble was required to convey to Bankers Mortgage Company a .0014 royalty interest in oil and gas and a 5/9¢ per long ton royalty on sulphur produced by Humble in the Sugarland Oil Field.

(b) Bankers Mortgage was given the option to require Humble to exercise the option described in (a) *supra*, if Humble did not voluntarily exercise it by giving notice to Humble to that effect within 20 days of Humble's failure to exercise it.

(c) If Humble did not exercise its option to purchase the property and Bankers Mortgage did not exercise its option to require Humble to purchase the

property, Bankers Mortgage could pay the remaining balance due under the note and secure a release of the lien.

(d) Bankers Mortgage was given the option at any time to cancel the indebtedness and interest due by conveying the full 2/3 mineral interest owned by Bankers to Humble.

(e) If the production from the Sugarland Field ceased and the property was abandoned by Humble before the full principal and interest payable on Note 1 was fully paid, the notes would be cancelled, and Humble would have the option to require Bankers Mortgage to convey the property to Humble under the same terms as described in (a) *supra*.

4. In reporting its income for 1937, the taxpayer treated the afore-mentioned transaction as a loan rather than a sale, but the Commissioner proposed a deficiency for that year, on the basis that the transaction constituted a sale of the taxpayer's mineral and royalty interest in the tract and the gain thereon was taxable. The Tax Court and the Court of Appeals for the Fifth Circuit upheld the Commissioner and found the transaction to be a sale. *Bankers Mortgage Co.* v. *Commissioner*, 1 T.C. 698 (1943), affirmed, 141 F. 2d 357 (C.A. 5th, 1941), rehearing denied, 142 F. 2d 130 (C.A. 5th, 1944, certiorari denied, 323 U.S. 727 (1944).

5. In 1962, when the principal on each note and the interest on the $100,000 note had been satisfied by the royalties payable to the taxpayer under the Cockburn lease, Humble did not exercise its purchase option under the contract. The taxpayer did not exercise its option to require Humble to carry out its purchase option and, instead, exercised its option to pay Humble $137,389.29 (which amount was equal to the interest due on the $200,000 note) and received a release of the deed of trust lien.

6. The taxpayer contended that the payment made by it to Humble in 1962 in the amount of $137,389.29 was deductible as interest on a loan. The defendant raised the affirmative defense of collateral estoppel, contending that the taxpayer is collaterally estopped by the previous decisions of the Tax Court and the United States Court of Appeals for the Fifth Circuit to deny that the 1937 transaction was a sale and is, therefore, collaterally estopped to contend that the payment made in 1962 was deductible interest on a loan.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this litigation as respects the year 1962.

2. The doctrine of collateral estoppel applies in the case and the taxpayer and the United States of America are bound by the decisions in *Bankers Mortgage Co.* v. *Commissioner, supra,* relating to the year 1937 for taxpayer, even though this proceeding involved a different tax year, *Commissioner* v. *Sunnen,* 333 U.S. 591 (1948).

3. Judgment shall be entered for the defendant.

DONE this 15th day of January, 1969.

UNITED STATES DISTRICT JUDGE

/s/ JOHN V. SINGLETON, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BANKERS MORTGAGE COMPANY *Plaintiff.* v. UNITED STATES OF AMERICA *Defendant.*	CIVIL ACTION No. 67-H-977

JUDGMENT

In accordance with the order of this Court dated November 1, 1968, and the findings of fact and conclusions of law of this same date, it is hereby

ORDERED, ADJUDGED AND DECREED that the plaintiff take nothing from the defendant and that its cause of action be dismissed with prejudice.

All costs will be paid by the plaintiff.

DONE this 15th day of January, 1969.

/s/ JOHN V. SINGLETON, JR.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

LIDDELL, DAWSON, SAPP & ZIVLEY

By:

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